DOCKET FILE COPY ORIGINAL

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999
WRITER'S DIRECT DIAL:
(202) 326-

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

October 29, 1998

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Tele-Communications, Inc. and AT&T Corp.
Comments of SBC Communications Inc.
CS Docket No. 98-178

Dear Ms. Salas:

Enclosed for filing are an original and twelve copies of the Comments of SBC Communications Inc. in the above-captioned matter.

Please call me at 202-326-7900 if you have any questions. Thank you for your assistance in this matter.

Sincerely,

Michael K. Kellogg

MKK:sls
Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Tele-Communications, Inc.	)	CS Docket No. 98-178
Transferor,	)	
AT&T Corp.	)	
Transferee,	)	
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, for Transfer of Control of Authorizations to Provide International Resold Communications Services	)	

COMMENTS OF SBC COMMUNICATIONS INC.

James D. Ellis
Liam S. Coonan
Wayne Watts
SBC COMMUNICATIONS INC.
175 East Houston Street
San Antonio, Texas 78205
(210) 351-3484

Norman M. Sinel
Stephanie M. Phillipps
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Michael K. Kellogg
Evan T. Leo
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

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EXECUTIVE SUMMARY

The merger between AT&T and TCI confirms that the trend in telecommunications markets is toward bundled, end-to-end services, offered nationwide and around the globe. Economies of size and scope are critical to the provision of such services, thus compelling the current trend in mergers. SBC agrees with AT&T and TCI that consumers stand to benefit from this trend—provided the provision of such services remains competitive.

Because the acquisition of TCI will position AT&T as the industry leader in the United States in four key sectors—long distance, cable, wireless, and competitive local exchange—SBC believes that the competitive effects of this merger require the exacting scrutiny of the Department of Justice. The Department, as part of its Hart-Scott-Rodino review, analyzes the competitive effects of mergers such as this one, bringing to bear the Department's substantial expertise and familiarity with applying merger guidelines and determining the impact of the proposed merger on relevant markets.

SBC believes that Department review should be sufficient to address the competitive issues presented by this merger. The Commission should not repeat that analysis as part of its public interest review. SBC recognizes, however, that the Commission has an established history of conducting its own review of competitive effects as part of its public interest analysis. To the extent that the Commission plans to conduct such a review in this case, the following points are critical:

First, the Commission must apply the same merger criteria to all major mergers that it reviews. A cardinal principle of lawful administrative process is even-handed treatment. This merger is indistinguishable from previous mergers in which the

Commission has applied the Bell Atlantic/NYNEX framework of analysis. Thus, to the extent that the Commission plans to adhere generally to the Bell Atlantic/NYNEX framework, it must apply that framework in this case.

Second, the Commission should note that the same market conditions that have prompted the Commission to impose resale and unbundling requirements in other contexts are present here as well. If the Commission is to maintain a consistent approach, it must condition this merger upon a requirement that AT&T unbundle any telecommunications services TCI offers, most particularly Internet services, offering the same, high-speed data transport capabilities to unaffiliated providers at wholesale prices, on a nondiscriminatory and competitively neutral basis to all who wish to compete.

Finally, the unconditional merger between AT&T and TCI will result in multiple violations of the CMRS spectrum aggregation limits established in 47 C.F.R. § 20.6. If the Commission allows this merger to go through without requiring a fully developed and clearly defined plan for divesting TCI's interest in Sprint PCS, the whole purpose of the spectrum cap will be undermined.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMMENTS OF SBC COMMUNICATIONS INC.

AT&T's decision to merge with TCI confirms that the trend in telecommunications markets is as we described in an earlier filing with the Commission.[1] Major players must build up and out, across service, functional, and geographic lines if they are to remain effective competitors in the new global environment. Even AT&T – already the largest U.S. telecom carrier – needs a broader reach to compete effectively in the emerging era of national and global, end-to-end competition. Earlier this year, AT&T

[1] *See* Applications of Ameritech Corp., and SBC Communications Inc., for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and

completed its $11 billion merger with TCG, following its $17.5 billion acquisition of McCaw cellular four years ago. Now AT&T is attempting a $32 billion acquisition of TCI and, according to press reports, AT&T is currently in active talks for further alliances with other major cable companies, including Time Warner, a $25 billion (revenues) company. A handful of other major players, SBC and Ameritech among them, are, of course, pursuing similar strategies. The Commission recently has approved the latest in the series of mergers that formed MCI/WorldCom/MFS/Brooks/UUNet. And comparable alliances are being formed at the global level: AT&T/BT, Sprint/Deutsche Telekom/France Telecom, among others.

SBC has a number of concerns about the competitive effects of the proposed TCI merger. SBC believes, however, that such competitive issues are properly dealt with by the Department of Justice as part of its statutory Hart-Scott-Rodino review of the proposed merger. The FCC, in its public interest inquiry, should not be duplicating the antitrust review conducted by the Department. That said, SBC recognizes that the Commission has a history of conducting antitrust-type reviews as part of its public interest analysis. On the assumption that it will do so here, SBC wishes to clarify the competitive concerns surrounding the provision of "bundled services" by a combined AT&T/TCI.

Although AT&T does not treat bundled services as a separate market in its own application, it has treated this as a separate market in other merger proceedings, most

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310(d) of the Communications Act, and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Dkt. No. 98-141 (filed July 24, 1998) ("*SBC-Ameritech Application*").

recently in its petition to deny the SBC/Ameritech merger.[2] And the FCC has separately analyzed the bundled services market in numerous prior merger proceedings,[3] repeatedly noting the value of "one-stop shopping."[4] Rapidly developing technology has made the provision and marketing of bundled services feasible, and the market is keeping pace with those developments.[5] For example, MCI WorldCom's On-Net service offers business customers "a single access method for all of their voice, data and Internet services" on "one seamless, end-to-end network."[6]

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[2]*See* Petition of AT&T Corp. to Deny Applications at 31, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp. to SBC Communications Inc.*, CC Dkt. No. 98-141 (Oct. 15, 1998) ("The merger will impede competition in the emerging bundled services market by allowing applicants to subject their rivals to price squeezes in the long distance market"). SBC and Ameritech as well as Bell Atlantic and GTE separately analyzed the bundled services market in their respective transfer applications now pending before the Commission.

[3]*See, e.g., Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 52 (1997) ("*Bell Atlantic/NYNEX*"); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order ¶ 217, CC Dkt. No. 97-211 (FCC Sept 14, 1998) ("*MCI/WorldCom*"); *The Merger of MCI Communications Corporation and British Telecommunications plc*, Memorandum Opinion and Order, 12 FCC Rcd 15351, ¶ 130 (1997) ("*MCI/BT*"); Sprint Corporation, Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, 11 FCC Rcd 1850, ¶¶ 84-86 (1996).

[4]*See, e.g., Bell Atlantic/NYNEX*, ¶ 112; *MCI/WorldCom* ¶ 199; *see also* Statement of William E. Kennard, Chairman, FCC, On Section 271 of the Telecommunications Act of 1996, Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, United States Senate, Mar. 25, 1998.

[5]*See Application of Motorola, Inc. Transferor, and American Mobile Satellite Corporation Transferee, For Consent to Transfer Control of Ardis Company*, Memorandum Opinion and Order, 13 FCC Rcd 5182, 5192-93 (1998) ("*Ardis Order*") ("As competition increases and more telecommunications carriers enter each other's markets, carriers are increasingly bundling packages of telecommunications services.").

[6]MCI WorldCom Press Release, *MCI WorldCom Unveils New "On-Net" Communications Services For Businesses*, Sept. 28, 1998.

The intent to enter the market for bundled services is one of the main stated reasons for this merger,[7] and a combined AT&T/TCI will be a leading force in this ever-growing market given the dominant position each company now occupies in its respective fields of operation. AT&T is the largest provider of domestic and international long-distance telephone service in the United States, operates in more than 250 countries and territories throughout the world, and boasts revenues of more than $51 billion.[8] AT&T, through AT&T WorldNet Service and TCG's CERFNet, provides Internet access service to approximately 1.25 million customers. AT&T also serves approximately 6.6 million customers through its cellular and personal communications services.[9]

TCI, for its part, is one of the largest providers of cable television services in the United States. TCI operates cable systems in 44 states plus the District of Columbia. According to TCI's Second Quarter, 1998 Report, the company passed 22 million homes and had 13 million basic subscribers as of June 30, 1998.[10] TCI has "approximately 33

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[7]*See* AT&T Press Release, *AT&T, TCI To Merge, Create New AT&T Consumer Services Unit,* June 24, 1998 (*quoting* C. Michael Armstrong: "We are merging with TCI not only for what it is but for what we can become together. Through its own systems and in partnership with affiliates, AT&T Consumer Services will bring to people's homes the first fully integrated package of communications, electronic commerce and video entertainment services.").

[8]*See* AT&T/TCI Merger Application at 3-4 ("*Application*").

[9]In addition, on October 5, AT&T signed a definitive merger agreement with Vanguard Cellular, which provides service under the Cellular One brand name to approximately 6.8 million POPs and 625,000 customers. *See* Vanguard Press Release, *AT&T Announces $1.5 Billion Merger With Vanguard Cellular Systems; Vanguard Properties Will Fill Strategic Gap*, Oct. 5, 1998.

[10]*See* TCI Press Release, *TCI Group Announces Second Quarter Results*, Aug. 14, 1998.

million households in its footprint including non-consolidated partnerships."[11] TCI is the managing partner of the @Home Network, a leading provider of high speed Internet access and Internet content over cable. In addition, TCI has begun to offer local exchange service on a trial basis in four states, and it operates common carrier microwave services in 18 states. TCI, through its Liberty Media Group, also holds interests in various companies that provide video programming.

AT&T recognizes, as does SBC, that consumers are increasingly coming "to expect and demand bundled product offerings."[12] As the Commission has noted, there is research showing that nearly 80% of American households would like to receive telecommunications and information services (local telephone, long distance, cable television, cellular, paging, and Internet access) from a single provider.[13] The proposed merger between AT&T and TCI confirms that, to compete in this marketplace, a company must be everywhere its customers are – and able to offer them the latest technologies, features, and services.

In sum, the acquisition of TCI will position AT&T as the largest telecom player in the United States in four key sectors: long distance, cable, wireless, and competitive local exchange service. With unconditional control over TCI's vast cable systems, AT&T will be not merely dominant, it will be the only significant company able to provide fully

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[11]G. Farber, SG Cowen Securities Corporation, *Cable TV Industry*, Investext Rpt. No. 2654791, (July 30, 1998).

[12]*Ardis Order*, ¶17.

[13]*See Bell Atlantic/NYNEX*, ¶ 112 n.219.

integrated communications services. AT&T's own chairman says so himself.[14] As SBC has argued in its own application to merge with Ameritech, consumers will benefit from the trend toward bundled, end-to-end services, offered nationwide and around the globe. But consumers will benefit only if the provision of such services remains competitive.

Accordingly, a full assessment of the long-term competitive structure of the industry now evolving and the effects on that industry of the proposed merger is critical. SBC believes that such an analysis should be conducted by the Department of Justice as part of its Hart-Scott-Rodino review. To the extent, however, that the Commission plans to duplicate that review, three points are in order. First, there would be no basis for the Commission to apply different merger criteria to this transaction than it does to other major telecom mergers. Second, because the same market conditions that prompted the Commission to impose resale and unbundling requirements in other contexts are present here, resale and unbundling conditions are no less appropriate here as well. Finally, consistent with its own, longstanding regulations, the Commission must require a fully developed and clearly defined plan for divestment of TCI's interest in Sprint PCS.

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[14]*See* AT&T Press Release, *supra*, n.7, (*quoting* C. Michael Armstrong: "AT&T Consumer Services will bring to people's homes the *first* fully integrated package of communications, electronic commerce and video entertainment services.") (emphasis added); *see also Application* at 39.

ARGUMENT

I. The Commission Must Apply the Same Merger Criteria to All Major Mergers That It Reviews

The Commission and the Department of Justice share concurrent jurisdiction with respect to mergers such as this one. When the Department of Justice analyzes the competitive effects of a merger, it conducts a thorough review and brings to bear its substantial expertise and familiarity with applying merger guidelines and determining the impact of the proposed merger on the relevant markets. To the maximum extent possible, and consistent with the federal government's larger policy of streamlining administrative process, the Commission should avoid time-consuming duplication of effort. The global telecommunications market is dynamic, with constant and accelerating changes. The U.S. role in this market would not be well served by unnecessary delay.

In the turbulent circumstances of the present industry, however, the Commission has repeatedly opted to engage in a full-fledged, second review of major mergers. The Commission's definitive description of its logic and methodology was set out in connection with the Bell Atlantic/NYNEX merger. Notwithstanding the duplication and delay inherent in this approach, the Commission has consistently applied the *Bell Atlantic/NYNEX* standard in reviewing subsequent mergers[15] – it did so again as recently

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[15] *See, e.g., Application of Teleport Communications Group, Inc. and AT&T Corp. for Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, Memorandum Opinion and Order ¶ 18, CC Dkt. No. 98-24 (FCC July 23, 1998) ("*AT&T/TCG*"); *MCI/BT*, ¶ 12; *MCI/WorldCom* ¶ 13; *Applications of Pacificorp Holdings, Inc. and Century Telephone Enterprises, Inc. for Transfer of Control of Pacific Telecom, Inc.*, CC Dkt. No. 97-2225 (Oct. 17, 1997) ("*Pacificorp/Century*").

as last month.[16] Procedurally, it has been the Commission's consistent policy to engage in a review of Hart-Scott-Rodino documents,[17] and to require extensive additional description and confirmation of the merging parties' competitive intentions in separate filings with the Commission.[18]

A cardinal principle of lawful administrative process is even-handed treatment. So long as the Commission chooses to engage in a time-consuming, full-fledged, second-tier review of telecom mergers otherwise cleared by the Department of Justice, it must engage in that same second-tier review for all. That means, notwithstanding the inevitable delay, the *Bell Atlantic/NYNEX* framework must apply here as well.

In all relevant respects, this merger is indistinguishable from previous mergers in which the Commission applied the *Bell Atlantic/NYNEX* analysis. Just like Bell Atlantic/NYNEX, MCI/WorldCom, AT&T/TCG, and MCI/BT, AT&T and TCI must obtain approval from the Commission for their proposed merger because it involves the transfer of licenses pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("the Communications Act").[19] Moreover, AT&T's merger with TCI involves – as did AT&T's merger with TCG[20] and MCI's merger with BT[21] – both

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[16]*See MCI/WorldCom* ¶¶ 15-22.

[17]The Commission should act promptly on the Motion of SBC Communications Inc. to Request Review of Hart-Scott-Rodino and Other Documents, filed October 14, 1998.

[18]*See* Letter from Carol E. Mattey, Division Chief, Policy and Program Planning Division, FCC, to Andrew D. Lipman, Swidler & Berlin, Counsel for WorldCom, and Anthony C. Epstein, Jenner & Block, Counsel for MCI (Apr. 21, 1998).

[19]*See* 47 U.S.C. §§ 214(a), 310(d) (1997).

[20]*See AT&T/TCG* ¶ 18.

[21]*See MCI/BT* ¶¶ 39-40.

horizontal and vertical aspects. That the merging parties represent a relatively small percentage of the market is irrelevant; as long as they are competitors, the Commission, to be consistent, must apply the *Bell Atlantic/NYNEX* framework.[22]

AT&T concedes in its application that AT&T and TCI currently compete in many of the same local markets. For example, both AT&T and TCI provide residential local exchange and exchange access services in California, Connecticut, Illinois, and Texas.[23] The Commission has already recognized that the local exchange and exchange access market is a transitional one and that AT&T is one of its "most significant market participants."[24] "[The *Bell Atlantic/NYNEX*] framework," the Commission has concluded, is the "appropriate analytical tool for assessing potential competitive effects where the relevant market is a transitional market and at least one of the merging firms is a precluded competitor in the relevant market."[25]

TCI can also be considered a significant market participant in the local exchange and exchange access services market, given its capacity to enter the market and the steps it has take to enter the market already.[26] TCI has the network to reach a third of all U.S.

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[22]*Cf. Pacificorp/Century* ¶ 13.

[23]*See Application* at 19.

[24]*MCI/WorldCom* ¶ 171; *AT&T/TCG* ¶ 25; *Bell Atlantic/NYNEX* ¶ 82.

[25]*MCI/WorldCom* at ¶18.

[26]*See Bell Atlantic/NYNEX* ¶ 62 ("In determining the most significant market participants from the universe of actual and precluded competitors, we identify the market participants that have, or are likely to speedily gain, the greatest capabilities and incentives to compete most effectively and soonest in the relevant market.").

homes,[27] which makes it uniquely situated to pave the way toward advanced voice and data services over cable. Cable is proving itself to be a strong new competitor in telecom markets. TCI itself has already begun to offer local telephony in four cities: San Jose, California, Dallas, Texas, Hartford, Connecticut, and Arlington Heights, Illinois. In 1997, Cox Communications introduced its local phone service to residential customers in Orange County, California, and Omaha, Nebraska,[28] and it has been quite successful.[29] MediaOne Group has recently introduced phone service in Atlanta, Los Angeles, Jacksonville, Boston, and Pompano, Florida, and says its results are "encouraging."[30] Jones Intercable has been offering phone service to MDU residents in Alexandria, Virginia since late 1995 and to Prince George's County, Maryland residents since 1996.[31] Cablevision has been offering local telephony to 4,900 homes on Long Island since late last year and achieved penetration rates of 12 percent in just the first few months.[32] RCN

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[27]*See* G. Farber, SG Cowen Securities Corporation, *Cable TV Industry*, Investext Rpt. No. 2654791, (July 30, 1998); *Frost & Sullivan's Analysis of the Proposed Merger Between AT&T and TCI*, PR Newswire, June 25, 1998.

[28]*See* Moody's Investor Service, *Cox Communications*, Investext Rpt. No. 3275589, (June 13, 1998).

[29]*See* L. Cauley, *Right Number? In Southern California, Cox Communications Rattles a Baby Bell*, Wall St. J., Aug. 6, 1998, at A1.

[30]*See* L. Cauley, *Telecommunications (A Special Report): Bypassing the Bells*, Wall St. J., Sept. 21, 1998, at R14.

[31]*See* K. Gibbons, *Back From the Dead; Demand for Telephony*, Multichannel News, June 29, 1998, at 22A.

[32]*See* J.R. Cohen, *et al.*, Merrill Lynch Capital Markets, *Cablevision Systems Corp. – Company Report*, Rpt. No. 2691812 (May 14, 1998).

is currently providing local and long distance phone, cable television, and high-speed Internet access services in several markets from Boston to Washington, DC.[33]

If the merger is approved, AT&T will own and operate the nation's most extensive, broadband local network platform. The purchase of TCI's extensive cable operations will give AT&T power "to control the architecture" of the local service it offers.[34] AT&T plans to begin deploying Internet Protocol (IP) telephony on TCI's systems in 1999.[35] Thus, a combined AT&T/TCI will certainly be a key player in the local services market. The merger of these two local exchange competitors, therefore, is indistinguishable from previous cases in which the Commission has applied the *Bell Atlantic/NYNEX* standard.[36]

II. The MVPD Market Conditions Present the Same Issues That Led the Commission to Impose Resale and Unbundling Obligations in Other Contexts

TCI is a nationwide collection of local cable affiliates that dominate the market for multichannel video programming distribution ("MVPD") in their respective geographic markets. As the Commission has noted, "[l]ocal markets for the delivery of video programming generally remain highly concentrated and are still characterized by

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[33]RCN also recently announced plans to expand its target market to include California's San Francisco-to-San Diego corridor. *RCN Doubles On-Net Homes Passed; Advanced Fiber Connections Up More Than 135 percent*, PR Newswire, July 22, 1998.

[34]V. Morris, *AT&T/TCI Press Conference*, CNN, Trading Places, June 24, 1998 (*quoting* C. Michael Armstrong).

[35]*See* V. Vittore, *MCI, Cisco, IBM Team Up on SNA*, Telephony, July 6, 1998.

[36]TCI and AT&T are also horizontal competitors in the wireless and Internet markets. *See* Application at 6-7 & n.9, 9-10.

some barriers to both entry and expansion by competing distributors."[37] DBS remains a limited competitor because of significant differences with cable.[38]

Faced with comparable conditions in other markets, the Commission has imposed resale and unbundling obligations to lower entry barriers for competitors. As early as 1976, the Commission required AT&T to permit resale of private line services, reasoning that this would promote cost-based rates; better management of networks; better use of capacity; and incentives for the development of ancillary services.[39] In 1980, the Commission concluded that mandating resale of public switched network services would curb price discrimination, facilitate competitive entry, spur the introduction of new and specialized services, promote innovation by equipment manufacturers, and increase demand for new services.[40]

In 1981, the Commission imposed comparable resale obligations on cellular carriers, to remain in effect during a five-year transitional period.[41] When it extended

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[37] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, ¶ 11 (1998) ("*Fourth MVPD Competition Report*").

[38] *Id.*

[39] *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 F.C.C. 2d 261 (1976), *recon. granted in part*, Memorandum Opinion and Order, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

[40] *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, 83 FCC 2d 167, ¶¶ 8-9, 39-43 (1980).

[41] The resale rule is now codified at 47 C.F.R. § 20.12(b). It applies to providers of Broadband Personal Communications Services, providers of Cellular Radio Telephone Service, and Specialized Mobile Radio Services in the 800 MHz and 900 MHz bands. *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Dkt. No. 98-100, 1998 WL 374954, ¶¶ 33-44 and accompanying notes (July 2, 1998)

that period in 1996, the Commission pointed out that resale obligations are appropriate "in markets that have not achieved full competition;" such obligations help to "replicate many of the features of competition, including promotion of competitive pricing and discouraging unreasonably discriminatory practices. At the same time, resale hastens the arrival of competition by speeding the development of new competitors."[42] And for similar reasons, pursuant to the mandate of the 1996 Act, the Commission has recently imposed extensive resale and unbundling obligations on incumbent local exchange carriers.

To the extent this logic is valid, it applies with equal force here, to the TCI cable systems that AT&T proposes to acquire.[43] The cable markets in question are far from fully competitive.[44] TCI is already very large, and in combination with AT&T it will be huge. TCI's strategy of developing interconnected, regional cable "clusters" that share

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(discussing history of resale rule). *See also Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Report and Order, 7 FCC Rcd 4006, ¶¶ 7-26 (1992).

[42]*Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, ¶ 11 (1996).

[43]Some may argue that resale is not necessary in the cable market because the Cable Act requires operators to set aside a certain number of leased channels for unaffiliated programmers. 47 U.S.C. § 532 (1994 & Supp. 1998). The leased channel provisions address a very different issue than is being raised here. Those provisions were adopted to provide unaffiliated programmers with the means to distribute their programs to cable subscribers. The provisions were intended to foster program creation and diversity of programming sources. *See* H.R. Rep. No. 98-934 (1984). The purpose of a resale condition is to enable providers to make available to customers (which may or may not be existing cable subscribers) the entire service offering of a TCI cable operator, either separately or as part of a package of services. The leased channel provisions would not begin to serve that purpose. Moreover, the Commission has acknowledged that the leased channel provisions have not even achieved their more limited program diversity purposes. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933, ¶ 9 (1996).

[44]*Fourth MVPD Competition Report*, ¶¶ 126-128.

common costs and facilities further enhances the market power of TCI systems.[45] No other MSO will be of remotely comparable size or power.[46] If resale obligations are needed in any telecom market, they are certainly needed here.

If the Commission is to maintain a consistent approach, it must therefore condition this merger upon a requirement that TCI make its monopoly cable services available for resale on a nondiscriminatory and competitively neutral basis.[47] Here, as elsewhere, affording competitors the right to resell will permit them to gain a toehold in markets before they deploy facilities of their own.[48] Resale will lower entry barriers, push price toward cost, and spur innovation. And a resale obligation is also a cost-effective alternative to FCC rate regulation, which is scheduled to expire in March 1999, well before the market has attained full competition.[49]

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[45]The Commission has worried that while clustering has certain cost-saving benefits for incumbent operators, "clustering raises certain anticompetitive concerns," including the elimination of adjacent cable operators as potential overbuilders. *Fourth MVPD Competition Report*, ¶¶ 140-141.

[46]That may soon change if, as has been recently reported, AT&T enters into exclusive arrangements with other cable MSOs such as Time Warner. *See AT&T Telephony Affiliates Loom*, Multichannel News, Oct. 19, 1998, at 1.

[47]The Commission clearly has the power to impose a resale condition in the context of its power to ensure that this merger meets the public interest. In addition, we believe the Commission has the legal authority to prescribe a cable resale requirement pursuant to its broad authority to ensure the reasonableness of cable rates under Section 623 of the Cable Act and to carry out the purposes of the Communications Act. For similar reasons, ancillary jurisdiction principles also confer authority to adopt a cable resale rule. Such a rule is not expressly prohibited and is necessary and appropriate to implement the goals and purposes of the 1996 Act and Section 623. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 176 (1968).

[48]As noted above, Ameritech New Media has obtained cable franchises for certain jurisdictions in Ohio, Illinois, and Michigan, and TCI is the incumbent in a number of those jurisdictions. In contrast to TCI's cable systems, Ameritech's franchises are relatively new and largely unbuilt. Ameritech is already at a competitive disadvantage because it must compete without an established customer base. The merger puts Ameritech at an even greater disadvantage in TCI markets because Ameritech does not have the size, scope, and geographic coverage of the new TCI/AT&T.

[49]Separate Statement of Chairman William E. Kennard, accompanying *Fourth MVPD Competition Report*.

A resale obligation imposed on AT&T/TCI would simply mirror the telephone model.[50] Following that model, the Commission should also impose an initial requirement that AT&T unbundle any telecommunications services TCI provides, offering the same data-transport capabilities to non-affiliated providers at wholesale prices and in a nondiscriminatory manner. AT&T has repeatedly described the Internet as one of the key services that the acquisition of TCI's 13 million local access lines will enable AT&T to provide. As TCI upgrades its cable plant, there will be significantly expanded capacity available for Internet service and next-generation services, including IP telephony. AT&T will have every incentive to favor TCI's @Home Internet service or other affiliated Internet service providers to the disadvantage of providers that are not affiliated with AT&T or that do not have a contractual relationship with AT&T.[51] The Commission should, therefore, require AT&T to unbundle any telecommunications services TCI offers, most particularly Internet services, offering the same, high-speed

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[50]Under the 1996 Act provisions concerning resale of ILEC services, State commissions must "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will avoided by the local exchange carrier." 47 U.S.C. §252(d)(3) (1994 and Supp. 1998). The Commission adopted rules directing a State commission to use "avoided cost studies" in determining wholesale rates. The Commission also adopted a default range of discounts from retail rates to be used until a State commission could undertake the studies required by the Commission's rules. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utilities Bd. v. Federal Communications Comm'n*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 118 S. Ct. 879 (1998). With respect to cable resale, the Commission could adopt a national range of discount percentages to be applied to local retail rates for cable service. The Commission already has substantial data on cable system costs that it has collected or received in connection with cable rate regulation. The Commission could use that data to develop the initial range of discount percentages, subject to adjustment if updated cost data is collected.

[51] The issues that the AT&T/TCI merger raise for Internet service have been discussed in the FCC Office of Plans and Policy's ("OPP's") working paper on Internet services. *See* FCC, OPP Working Paper Series No. 30, *Internet Over Cable: Defining the Future In Terms of the Past*, at 95 (authored by Barbara Esbin) (Aug. 1998) ("OPP Working Paper") *available in* 1998 WL 567433.

data transport capabilities to unaffiliated providers at wholesale prices, on a nondiscriminatory and competitively neutral basis to all who wish to compete.

III. Wireless Overlap Problems

The unconditional merger between AT&T and TCI will result in the violation of the CMRS spectrum aggregation limits established in 47 C.F.R. § 20.6. TCI currently holds a 30% interest in Sprint Spectrum Holding Co., L.P., which in turn holds a 99% interest in the operating subsidiaries that control Sprint PCS.[52] Under 47 C.F.R. § 20.6(d)(2), Sprint's PCS licenses are attributable to TCI because TCI's interest "amount[s] to 20 percent or more." Thus, if AT&T and TCI come under common ownership, the newly formed entity will violate § 20.6 in every area in which AT&T has either a cellular (25 MHz) or an A or B block PCS license (30Mhz), and Sprint has an A or B block PCS (30 MHz) license. Ninety-seven of AT&T's 108 cellular licenses, 185 of AT&T's 192 BTA PCS licenses, and ten of AT&T's 20 MTA PCS licenses overlap with Sprint PCS. The overlapping areas include 27 of the top 100 cellular MSAs in population, 43 of the top 100 BTAs in population, and 3 of the top 10 MTAs in population. The total (non-duplicated) POPs in the areas where AT&T's wireless holdings and Sprint's PCS holdings (in which TCI has an interest) overlap is 162,132,545. The impact on competition is even more acute than the overlaps suggest because Sprint is the largest PCS competitor in the country. Sprint has networks

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[52] *See Application* at 10 n.15.

operational in 52 BTAs in 30 states nationwide; this is more than twice the number of any other PCS licensee.[53] And Sprint has more operational PCS networks than any other carrier in the areas where AT&T provides wireless service. Accordingly, the Commission should condition its approval of the merger on a fully developed and clearly defined plan for the divestment of TCI's interest in Sprint PCS.

AT&T, however, boldly contends that these violations – which it never bothers to detail in its application – are not a problem because Sprint Spectrum will soon be restructured such that TCI will own 23.8% of the outstanding shares of the new Sprint PCS Tracking Stock.[54] Under § 20.6, however, this decrease in ownership is irrelevant because it still falls above the 20% threshold established by the Commission. Although AT&T repeatedly emphasizes that TCI will own a voting interest of less than 3% after the restructuring, this point, too, is irrelevant because "[n]on–voting stock shall be attributed as an interest in the issuing entity" if it is in excess of the 20% threshold established by § 20.6. Since TCI's interest in Sprint is above 20% both before and after the restructuring, the regulation is violated in both instances. Furthermore, AT&T's "solutions" to this problem give the Commission no assurance that the violations will be fixed expeditiously – if indeed they will be fixed at all. AT&T claims that, after the merger and the restructuring, Liberty *could* sell part of its interest in Sprint PCS or that it *could* place the Sprint PCS stock into a qualifying voting trust.[55] But neither AT&T nor

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[53]*See* Federal Communications Commission, Broadband PCS A- and B- Block Licensee Information, Oct. 1, 1998.

[54]*See Application* at 11.

[55]*See Application* at 32 n.63.

TCI commits to doing anything either before or after the merger to comply with 47 C.F.R. § 20.6. Moreover, as AT&T concedes, the Sprint restructuring, including its timing, is not within AT&T's control because it requires Sprint stockholder approval and completion of an initial public offering. Sprint recently announced that it will postpone its planned initial public offering "until market conditions improve."[56] A Sprint spokesman said that Sprint's investment bankers will reconsider a public offering in three to four months.[57]

The wireless industry grew by an average of 10.4 million subscribers (a whopping 32%) per year from year-end 1994 to year-end 1997. From 1997 to 1998, subscribership is estimated to increase by 13.1 million subscribers, and from 1998 to 1999, it is estimated to increase by 12.9 million subscribers.[58] In an industry experiencing such rapid growth, even one year would be an enormous amount of time to allow AT&T/TCI to violate the spectrum limits because those 13.1 million new customers will have, in many markets, only a limited choice between AT&T or AT&T-owned Sprint PCS. The merger, therefore, should not go forward until AT&T presents a fully developed and clearly defined plan for divesting TCI's interest in Sprint PCS.

AT&T suggests – albeit in a footnote – that the FCC could waive the many regulatory violations the merger will create.[59] As an initial matter, the factual basis for

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[56] R. Blumenstein, *Sprint to Disburse Wireless Venture Amid Delay in IPO*, Wall St. J., Oct. 29, 1998, at A8.

[57] *See Sprint Defers Wireless Sale Citing Wild World Markets: Uncertainty Prompts Delay in Initial Offer*, N.Y. Times, Oct. 29, 1998, at C2.

[58] *See* FCC, Third Annual CMRS Competition Report, FCC 98-91, at B-2, B-8 (rel. June 11, 1998).

[59] *See Application* at 31 n.61.

AT&T's argument – that TCI is a "passive" equity holder of 23.8% of Sprint stock – is based upon TCI's interest *after* the proposed restructuring. Restructuring, AT&T concedes, is not within its control, so the relevant interest TCI holds is its current 30% interest.[60] Second, whether the Sprint stock is attributed to the Liberty Media Group, the TCI Group, or the TCI Ventures Group is irrelevant because all these groups are under the control of TCI[61] and, consequently, will be under the control of AT&T after the merger. AT&T's decision to "operat[e] and track[]" the various groups separately[62] is a matter of internal management and such bureaucratic reorganization does not alter the regulatory violation. Third, AT&T's claim that the holding is "passive" and that Liberty Group will not influence Sprint PCS "on a regular basis" is flatly at odds with TCI's investment philosophy, which "*mandates that its investments be large enough to impact the strategic direction of a business.*"[63] AT&T has failed to contradict the Commission's determination that "even an entity that does not have de facto or de jure control but owns a 20 percent or more interest in a licensee would have sufficient influence to reduce competition and should be subject to the CMRS spectrum aggregation limit."[64]

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[60]*See Application* at 10 n.15.

[61]TCI Annual Report 1997, Statement of President Hindery.

[62]*Application* at 31 n.61.

[63]TCI Annual Report 1997 (emphasis added).

[64]*Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, Report and Order, 11 FCC Rcd 7824, 7880 (1996). *See also, id.* at 7882 ("We reject a control-based attribution test because significant, but non-controlling, investments have sufficient potential to affect the level of competition in the CMRS market. The CMRS spectrum cap ownership attribution rule, just as all other ownership attribution rules and similar statutory provisions, must take such interests into account. Economic theory predicts that where a CMRS licensee owns a substantial portion of one of its competitors, neither company has as strong an incentive to compete

AT&T has also failed to demonstrate that waiver of the CMRS spectrum cap serves the public interest and that the overlap will not affect markets in an anti-competitive manner.[65] AT&T argues that such a waiver is necessary because "[r]equiring Sprint to redeem TCI's interests for cash or other considerations immediately necessarily would [reduce] the investment that Sprint could commit to developing its PCS service" and "would greatly increase the amount of available stock in the public market [impairing] Sprint's own ability to issue new PCS stock as a source of capital."[66] This argument "fails to establish the existence of special circumstances that differentiate [Sprint] from any other entity that might seek a waiver of the spectrum cap rule."[67] Every company can make a claim that a waiver is necessary to promote its financial well being and consequently its ability to invest further in the PCS market. Surely more is needed to obtain a waiver than a claim that the waiver will help a company earn greater profits which, in turn, will make the company (as opposed to the market itself) more competitive. If that showing suffices for a waiver, § 20.6 would become, in practice, a nullity. The Commission, however, clearly intended to impose a stricter regime in establishing the spectrum cap on CMRS:

> A cap is a bright line test that provides entities who are making acquisitions with greater assurance than a case-by-case approach

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vigorously against its partner as it does with respect to an unrelated competitor. . . . Even 'silent financial interests' – i.e., non-controlling shares – may affect the behavior of the partly owned company by causing the minority owner to take into account its behavior on the profits of its partly owned competitor.").

[65] *See* 47 C.F.R. § 20.6 note 3.

[66] *Application* at 11 n.17.

[67] *Application for Review of BellSouth Wireless, Inc. Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Memorandum Opinion and Order, 12 FCC Rcd 14031, 14037 (1997) ("*BellSouth Wireless Order*").

> that if they fall under the cap, the Commission will approve the acquisition. The cap is particularly useful to entities formulating strategies and lining up financing in anticipation of the broadband PCS auctions. The bright line test also eases the administrative burden on the Commission.[68]

It is especially ironic that AT&T would make this financial hardship argument on behalf of Sprint PCS, the nation's largest digital nationwide wireless network with more than one million subscribers and service available in 134 markets.[69] If anything, increasing the strength of Sprint is arguably anticompetitive, given the unique national scope that Sprint has in the wireless market. Indeed, the unity of ownership of Sprint PCS licenses and AT&T's wireless licenses is the very combination §20.6 seeks to prevent.[70]

Allowing this merger to go through without requiring a fully developed and clearly defined plan for divesting TCI's interest in Sprint PCS would completely undermine the purpose of the CMRS spectrum cap, which is "to promote diversity and competition in mobile services, by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service

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[68] *Implementation of Sections 3(n) and 332 of the Communications Act*, Third Report and Order, 9 FCC Rcd 7988, 8104-05 (1994).

[69] *See* TCI Annual Report 1997.

[70] "The Commission staff's HHI analysis indicates that the 45 MHz CMRS spectrum cap is needed to prevent undue market concentration and the noncompetitive conditions in local markets that result from such concentration. The pre-PCS market situation, consisting of two cellular carriers each with 25 MHz has an HHI of 5,000 – extremely high concentration. The two, overlapping cellular carriers are already prohibited from owning more than a 5 percent interest in each other. The addition of a third carrier, an SMR provider with 10 MHz, lowers the HHI only to 3,750. Adding the spectrum capacity provided by the issuance of new PCS licenses, if there was no spectrum cap, might result in the two cellular incumbents dividing all the PCS spectrum between themselves. With no new entrants, this would leave the HHI at its previous high level, defeating a major purpose of the Commission in creating broadband PCS – to bring more competition into the concentrated mobile telephony market." *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, Report and Order, 11 FCC Rcd 7824, 7871 (1996) ("*Spectrum Cap Order*").

providers if permitted to aggregate large amounts of spectrum."[71] AT&T/TCI and Sprint would certainly have an "undue concentration of licenses," and the excessive aggregation would "reduce competition by precluding entry by other service providers."[72] The number of actual and potential wireless competitors is already quite limited, and "[w]hile new entrants can de-concentrate many businesses, CMRS markets have significant barriers to entry, most notably the need for spectrum, the expense of obtaining the license and the high costs of construction and operation of new communications systems."[73] It is therefore necessary for the Commission to condition approval of the merger on a fully developed and clearly defined plan for divestment of TCI's interest in Sprint PCS.

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[71] *BellSouth Wireless Order* ¶ 12.

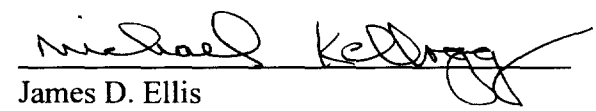
[72] *Id.*

[73] *Spectrum Cap Order* at 7871.

CONCLUSION

The proposed merger of AT&T and TCI will harm the public interest unless it is granted only subject to the above stated conditions.

Respectfully submitted,



James D. Ellis
Liam S. Coonan
Wayne Watts
SBC COMMUNICATIONS INC.
175 East Houston Street
San Antonio, Texas 78205
(210) 351-3484

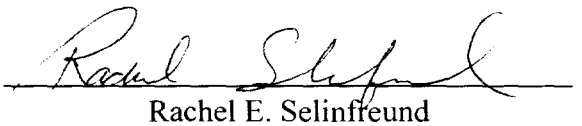
Norman M. Sinel
Stephanie M. Phillipps
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Michael K. Kellogg
Evan T. Leo
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

October 29, 1998

CERTIFICATE OF SERVICE

I, Rachel E. Selinfreund, hereby certify that on this 29th day of October, 1998, caused copies of the Comments of SBC Communications, Inc. to be served by hand delivery, upon the parties on the attached service list.



Rachel E. Selinfreund

In the Matter of
Tele-communications, Inc., Transferor,
AT&T Corp., Transferee
CS Docket No. 98-178

Service List

Federal Communications Commission

Deborah Lathen, Chief
Cable Services Bureau
2033 M Street, N.W.
Washington, D.C. 20554

Royce Dickens
Policy and Rules Division
Cable Services Bureau
2033 M Street, N.W., Room 406
Washington, D.C. 20554

Quyen Truong
Policy and Program Planning Division
Common Carrier Bureau
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Evette Keene
Video Services Division
Mass Media Bureau
1919 M Street, N.W., Room 712
Washington, D.C. 20554

Karl Kensinger
Satellite and Radio Communication Division
International Bureau
2000 M Street, N.W., Room 800
Washington, D.C. 20554

Sherille Ismail
Telecommunications Division
International Bureau
2000 M Street, N.W., Room 800
Washington, D.C. 20554

Walter Strack
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

ITS

International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

October 29, 1998